



TRAUMA-INFORMED  
PROSECUTOR PROJECT



Thursday, March 8, 2021



## **Child Abuse Prosecution Trial Advocacy Conference**

### **No Words Needed: Working with Recanting and Nonverbal Victims**

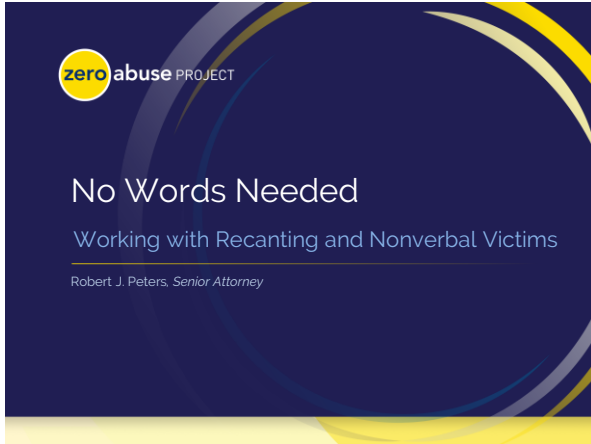
Presented by:

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Distributed by:

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## Disclaimer

- The following is not and is not intended to constitute legal advice.
- Always consult your local prosecutor or attorney for guidance.
- Credit to Victor Vieth and Zero Abuse Project team members for significant content and research contributions.



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## Understanding Recantation



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## Recantation Defined

"After reporting sexual abuse, the victim states the report was untrue"



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## Lyon, et al. Studies

- ✓ Most adult survey respondents reporting sexual abuse never disclosed as a child (2008)
- ✓ 60-80 of CSA victims delay disclosure until adulthood (OJJDP 2015)
- ✓ Children presenting to the hospital with genital gonorrhea without prior suspicion of abuse: <50% initially disclosed abuse (2007)
- ✓ 25% recantation in PA and CSA even with corroborating evidence (Hershkowitz, et al 2014)



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## Research on abuse disclosures by boys

- Boys disclose less frequently than girls
  - Afraid of being labeled weak, gay, and worried about reaction of parents and peers
- Boys disclose much later in life
  - Boys who did disclose took over 20 years to report
- "Victimization and the way it is experienced are different for boys than girls."
  - Parent & Benson (2012)



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## The Agenda

- Why children recant
- Assessing risk of recantation
  - Case Study
- Interventions to prevent recantation
- The importance of corroboration
- Preparing children for court
- Investigation of recantation
- Admitting original statement
- Nonverbal victim considerations
- Contingencies
  - Case study



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## How common is recantation?

- 4-27% of victims recant
- "Rule not the exception"
- Would a "real" victim recant?



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## Sorenson and Snow (1991)

- 116 cases of documented abuse
- 75% of the children initially denied abuse
- 78% made a tentative disclosure ("I forgot")
- 96% made an active disclosure
- After active disclosure, 22% recanted



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## Why do children recant?



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## Child Sexual Abuse Accommodation Syndrome

Dr. Roland Summit, *Child Abuse & Neglect* (1983)

- Secrecy
- Helplessness
- Entrapment and accommodation
- Delayed, conflicting and unconvincing disclosure
- Retraction



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## Secrecy

- It happens only when child and perpetrator are alone
- Secrecy is a "source of fear" (bad things will happen)
- Secrecy is a "promise of safety" (good things will happen)



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## Secrecy (cont.)

At least 27% of child abuse victims are threatened or told not to tell

See John R. Conte, ed., CRITICAL ISSUES IN CHILD SEXUAL ABUSE, 118 2002



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## Helplessness

- The child's size and immaturity breed a feeling of helplessness
- Children are taught to obey
- Threats of harm or loss of love may make a child feel helpless



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## Entrapment and accommodation

- Since the child is helpless, he or she learns to "accept the situation and survive."
- Multiple personalities (dissociative identity disorder)
- Dissociating
- Other coping mechanisms
- If the child cannot create a "psychic economy," feelings of rage may cause suicide, self-mutilation, promiscuity, etc.



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## Delayed & unconvincing disclosure

- Few children voluntarily disclose abuse
- Many disclosures are made by "rebellious adolescents or teenagers."



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## Retraction

- According to Summit, "in the aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true."



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## Assessing the Risk of Recantation



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### Family response & child placement research

- Children more likely to recant if family members not supportive and visitations with alleged offender recommended at first hearing
- Children less likely to recant when
  - removed from home post-disclosure
  - separated from siblings post-disclosure
  - Family members (other than non-offending parent) expressed belief in child's allegation
    - Malloy, et al (2016)



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### Child's relationship to the Offender

- Is the offender a family member with whom victim has had a close relationship?
- Does the child express ambivalent feelings about offender? ( i.e. 8 yr. old and his grandpa)



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### Child's placement after disclosure

- Has the child been removed from home while perpetrator remained in house?
- Does family visit child in placement and, if so, are they supportive?
- Does victim feel guilty that siblings are in protective custody?



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### Evidence of direct pressure

- Letters, phone calls, messages through family members or third parties
- Child given gifts by offender?
- Did non-offending parent take the child to religious leader to "confess the truth"?



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### Child's reactions

- Did child express fear of any team action?
- Fear of going to court?
- Hostility toward any team member?
- Other negative reaction to child protection/criminal justice system?



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## Media coverage

- May make it more difficult to recant
- On other hand, may cause recantation in effort to avoid glare of cameras, etc.



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## Family's response after disclosure

- Does the family as a whole support the victim?
- Does the non-offending parent support the child? (i.e. mom's reaction to child pornography)
- Evidence of non-support: jail calls, parent calls child liar, failure to show for appointments, etc.



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## Remember, Support is not Static!

- Some family members attempt to "play both sides"
- Support might not equate with belief
- Support may not be linear



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### Case Study: "Guilty or Innocent"

- Stage 1: (Correct) gut belief that perpetrator is guilty



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### Case Study: "Guilty or Innocent"

- Stage 2: Recognition that child's statement is corroborated



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### Case Study: "Guilty or Innocent"

- Stage 3: Recognition of defendant's credibility issues



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### Case Study: "Guilty or Innocent"

- Stage 4: Total disbelief of defendant



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### Case Study: "Guilty or Innocent"

- Stage 5: Supporting defendant



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### Case Study: "Guilty or Innocent"

- Stage 6: Relief to hear "the truth"



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### Case Study: "Guilty or Innocent"

- Stage 7: Loss of self respect; suicidal ideations



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### Case Study: "Guilty or Innocent"

- Stage 8: "Hope"; "It burns my soul"



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### Case Study: "Guilty or Innocent"

- Stage 9: "A Fall From Grace"



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## Case Study: "Guilty or Innocent"

- Stage 10: "Guilty or Innocent"



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## Hess sentenced to 120 to 300 years

By Eric Hinn | Times West Virginian | Feb 12, 2019



James Hess sits in the courtroom during his sentencing hearing on Monday.



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## Sentencing

Last year, Jeffrey L. Freeman, Marion County Prosecuting Attorney, announced that the trial team, led by former Assistant Prosecutor Robert J. Peters, successfully obtained a guilty verdict on all 24 felony sex crimes in the case. Freeman said the jury convicted Hess on 12 counts of sexual abuse in the first degree, and 12 counts of sexual abuse by parent, guardian, custodian, or person in a position of trust. Freeman stated the victim was eight at the time of the offenses, which spanned several months.

...

Those in support of Hess included four family members and a friend. They testified that they never saw Hess acting inappropriately with children. They also testified as to how the situation has devastated Hess' family. In addition, they testified to what they said was his good reputation in the community.



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## Interventions to Reduce Risk of Recantation



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## Interventions to Reduce Risk (cont.)

- Training (MDT members, judges, community)
- Thorough initial investigation (makes it more difficult for family members to side with offender)
- There is corroborating evidence in all cases
- Note: corroborating evidence may not be enough according to one study unless it brings support from other family members



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## The Critical Importance of Corroboration

- The case resolved more quickly, less time to put pressure on child
- May build support for child from family, schools, churches and other places the child is found
- If there is a recantation, may allow the government to still succeed at trial
- It should be at the heart of the FI



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**CENTER PIECE**  
The Official Newsletter of the National Child Protection Training Center

**When the Child Has Spoken:  
Corroborating the Forensic Interview**  
Victor I. Vieth<sup>1</sup>

**UPCOMING  
conferences**

**Forensic Interviewer  
at Trial:**  
This course is designed for teams of two: prosecutors and forensic interviewers. Prosecutors will be required to conduct a direct examination of forensic interviewers, and then conduct a re-direct examination after their forensic interviewers have been cross-examined. The prosecutors, working with forensic interviewers, must also respond to the criticism of their forensic interviewers from a defense expert.  
**Location:** Winona, Minnesota on Winona State University campus  
**Tuition Fee:** Please submit \$50 payment with your registration. Make checks payable to: NCPTC. Or pay online, when you register at [www.ncptc.org](http://www.ncptc.org).  
\* September training session: We are postponing registrations for

**Introduction**  
The historic purpose of a forensic interview is to take a child's statement in a legally defensible manner.<sup>1</sup> Indeed, the word "forensic" means "pertaining to, connected with, or used in courts of law."<sup>2</sup> To fulfill these historic and essential purposes, the forensic interviewer must be well trained in memory and suggestibility issues,<sup>3</sup> child development,<sup>4</sup> cognitive development, the usage of anatomical diagrams and dolls,<sup>5</sup> and must use a forensic interviewing protocol rooted in research.<sup>6</sup> The forensic interviewer must also participate in peer review, attend basic and advanced trainings and otherwise stay abreast of the field.<sup>6</sup>

Corroborating evidence doubles the chance a suspect will confess to child sexual abuse,<sup>7</sup> increases the likelihood of a prosecution,<sup>8</sup> and otherwise makes it more difficult for defense "experts" to attack the forensic interview.<sup>9</sup> For example, the defense "expert" may still challenge certain questions that lead to details pertaining to the child maltreatment, such as the usage of a lubricant, as suggestive but if the detectives find the lubricant in the exact location the child described, the defense challenge is weakened.

**Ten Tips for Corroborating the Child's Statement**  
To the search for corroborating evidence

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## Working with Non-offending Caregiver

- The number one risk of recantation
- Do mothers know?
- Many mothers will believe over time
- Factors include relationship w/ child (buddy/jealous or strong), relationship to perp (20 yrs/20 days)
- Supportive family (is mom isolated if she believes child?)
- Work w/ non-offending mom



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## No contact orders

- With offender/non-supportive family members
- Orders should be specific (no phone contact, letters, third parties, eye contact, distance, electronic communications, social media)
- Give orders to everyone who may need to know (e.g., school if offender ordered away from premises)
- Immediate consequences (higher bail or, if in custody, loss of phone or mail privileges, consider witness tampering charges).



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## Other Interventions to Reduce Risk

- Placement of child victim with supportive parent, extended family, or foster home
- Therapy for child
- Therapy for non-offending parent and family members
- Early and ongoing contact with MDT
- Work with media to limit coverage



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## Reducing Risk: Factors that Help Children Cope



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## Factors that reduce stress

- Parental support
- Support person
- Limited number of times of testifying
- Corroborating evidence
  - Goodman, et al (1992)



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## Preparing children for court



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## Preparing children for court

- Explain role of court players
- Use comparisons to familiar ideas
- When possible, introduce children to courtroom personnel
- Explain the relationship of the proceeding to the previous hearings and investigation
- Practice using equipment

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## The act of testifying



- Brief outline of the procedure for testifying
- The mechanics of testifying (microphone, nodding of head, etc.)
- Their role as a witness (explain what was seen and heard)
  - "I don't know"
  - "I don't understand"
  - "I don't remember"
- Children need to understand their role as just one part of the trial

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## Scheduling child testimony



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## Scheduling testimony

- Up to age 5, kids have afternoon naps and morning testimony may be preferred
- With school-age children, testimony during school hours may be preferable

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## Allowing a comfort item



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## Research supporting comfort item

- Many children derive comfort from a favorite toy or stuffed animal
- The items "symbolically represent a little bit of a mother's ability to soothe the child when frightened or nervous."  
– Saywitz (1999)



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## Child Advocacy Centers with Therapy Pets



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## The importance of recess



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## The importance of recess

- "Teachers do not ring the recess bell just to make kids happy. Teachers know children have a limited attention span in schoolwork, and that recess is essential for learning. If children need to recess to pay attention in the familiar environs of the classroom, how much more do they need recess during the stressful experience of testifying?"  
– Professor John Myers (2011)



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## Recesses during testimony

- Should recess when child shows signs of fatigue, loss of attention or unmanageable stress
- Signs calling for a recess: silence, series of "I don't know" or "I don't remember answers."
- Children can't take the initiative  
– Myers (2011)



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## The importance of a support person



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## Research on support person

- In a study of 218 child witnesses, researchers found a support person helped children respond to questions on direct examination
  - Goodman, et al (1992)
- Support person cannot prompt or coach a child
- Support person who is also a witness may have to testify first



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## Tone of voice, silent objections



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## Silent objections

- Children have egocentric personalities and take raised voices and animated argument personally
- Court can order counsel not to raise voice and to make "silent objection."
- Arguments made outside child's presence



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### Asking developmentally appropriate questions



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### Attorneys often ask confusing questions

- "On the evening of January 3<sup>rd</sup>, you did, didn't you, visit your grandmother's sisters' house and didn't you see the defendant leave the house at 7:30, after which you stayed the night?"
- "Well, I have jumped ahead a bit, so you will have to go back to what you were telling us about before the first incident. You told us of what you did and what he did to you. On the next occasion you went there, what kind of thing happened to you?"
  - Myers (1996)

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### Asking developmentally appropriate questions

- Avoid pronouns (he, she, etc.)
- Avoid "isn't it true..."
- Avoid estimates (how many times..)
- Cite literature and support with affidavit of someone familiar with child

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## Child friendly courtroom



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## Child friendly courtroom

- Can the child's feet touch the floor?
- Can the child see over the witness box?
- Where does the child want the support person?
- Exclude spectators during the child's testimony?
- Testimony by closed circuit or deposition?

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## Spiritual Considerations

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## Could spiritual care help?

Psychological Trauma: Theory, Research, Practice, and Policy  
2009, Vol. 1, No. 2, 130–145

© 2009 American Psychological Association  
1942-9681/09/\$12.00 DOI: 10.1037/a0016211

### Changes in Personal Religion/Spirituality During and After Childhood Abuse: A Review and Synthesis

Donald F. Walker, Henri Webb Reid, Tiffany O'Neill, and Lindsay Brown  
Richmont Graduate University

Psychologists have begun to consider the potential role of traumatic experiences on the victim's spirituality and religiousness as well as the role personal religious and spiritual faith might have in recovery from abuse. In this review, the authors were particularly interested in these issues as they pertain to childhood abuse. The authors identified 34 studies of child abuse as they relate to spirituality and religiosity that included information on a total of 19,090 participants. The studies were classified according to both the form of abuse and the form of religiousness or spirituality that were examined. The majority of studies indicated either some decline in religiousness or spirituality ( $N = 14$ ) or a combination of both growth and decline ( $N = 12$ ). Seven studies gave preliminary indications that religiousness/spirituality can moderate the development of posttraumatic symptoms or symptoms associated with other Axis I disorders. The authors discuss implications for both therapy and future research.

**Keywords:** childhood abuse, religion and spirituality



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## Religion and child abuse Tishelman & Fontes (2017)



- Foster respectful understanding between CACs and faith communities
- Provide education to faith leaders
- Train CAC staff on religious issues
- Discuss religious issues in MDT case reviews



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## When Prevention Fails: Investigating Recantation



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## Team investigation

- Review evidence from initial investigation (stronger the evidence, less likely recantation is true)
- Who notified the team of the recantation and is there a predisposition towards the suspect?



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## Information from "notifier"

- Words used (OK, he never did it. Is that what you wanted to hear?)
- Child's demeanor (is notifier's description believable?)
- Notifier and other's conduct toward child and initial allegations
- Circumstances prior to recantation (who brought it up?)
- Notifier's first reaction (called defense attorney)



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## Information from "notifier"

- Notifier's perception of changes after recantation (again, is it believable and can it be corroborated by v's friends, teachers, etc.?)
- Notifier's acknowledgment of presence of other witnesses



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## Team investigation of recantation

- Interview all witnesses of recantation
- Consider conducting additional forensic interview (discuss as MDT)
- Re-interview victim with same interviewer who did first interview (compare and contrast details)
- Ask about recantation: what happened before, after, reactions of family, etc.



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## The trial

- Postponement, if possible
- If not, get original statement admitted



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## Hearsay Exceptions

- Statement is not offered for the truth of the matter asserted
- Availability of declarant immaterial – IF no confrontation clause issue
  - “Statements by very young children will rarely, if ever, implicate the Confrontation Clause.”
    - *Ohio v. Clark*, 135 S.Ct. 2173, 2181-82 (2015).



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## Excited Utterance

- "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FRE 803(2)
- Hypothetical



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## Excited Utterance Questions

- Is child abuse a "startling event"?
- How much time has lapsed?
  - With children of tender years, long delays have been allowed by several courts
- Does your jurisdiction allow "rekindled excitement"?



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## Present Sense Impression

- "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FRE 803(1)
- Hypothetical



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## Statements for Medical Diagnosis

- "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." FRE 803(4)



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## Statements for Medical Diagnosis

- The rule is premised on the belief that we have a selfish motive to be truthful to our doctors
- But you have to know the statement will be used in treatment and the statement must be pertinent to treating you
- Hypothetical



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## State of Mind

- "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) but not including a statement of memory or belief to prove the fact remembered or believed..." FRE 803(4)
- Hypothetical



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## State of Mind Considerations

- Must be a then-existing state of mind ("my private parts really hurt" instead of "my private parts hurt yesterday")
- Use state of mind exception to prove a wide variety of relevant emotions (fear, affection, jealousy, anger, hate, prejudice, happiness, etc.)
- Another hypothetical



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## State Statutory Hearsay Exceptions

- **Child Hearsay When Declarant is Available at Trial and Subject to Cross-examination.**
  - A statement made by a child under the age of ten (10) years concerning any type of sexual offense, or attempted sexual offense, with, on, or against that child, which is inconsistent with the child's testimony and offered in a criminal proceeding.
  - Arkansas Rule of Evidence 803(25)



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## Residual or "catch all"



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| <ul style="list-style-type: none"> <li>• Play and gestures during disclosure</li> <li>• Developmentally unusual sexual knowledge</li> <li>• Child appropriate terminology</li> <li>• Idiosyncratic detail (smell, tastes, etc)</li> </ul> | <ul style="list-style-type: none"> <li>• Statement against interest</li> <li>• Motive to fabricate</li> <li>• Child disagrees or corrects interviewer</li> <li>• "Spontaneous" statements</li> </ul> |
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## Forfeiture of Confrontation Right

- Wrongdoing by defendant may forfeit confrontation right on equitable confrontation
- *Crawford, Davis & Hammon* relied on *Reynolds v. U.S.*, 98 U.S. 145, 158-159, 25 L. Ed. 244 (1879) which created the forfeiture by wrongdoing exception
- FRE 804(b)(6)



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## Forfeiture of Confrontation Right

- "One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis & Hammon*)
  - Killing the witness
  - Missing witness
  - Traumatized witness
  - Threats to witness, family, pets
  - Telling a child to "not tell"
  - Having others secure witnesses' unavailability



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## Forfeiture of Confrontation Right

- Need not be wrongful
  - Gifts, money, promises can be procurement
- Different rulings on specific intent
  - 804(b)(6) = specific intent
- Forfeiture Hearing
  - Hearsay evidence, including unavailable witness's out of court statements, are admissible



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## Nonverbal Victim Considerations



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## Nonverbal Victims

"A child does not need to speak to get justice:  
the child's disabilities simply need to be  
accommodated in court."

-Christina Rainville, Prosecuting Cases for Children on the Autism  
Spectrum, ABA (2013)



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## Nonverbal Victims

"Because of their vulnerabilities, persons with  
disabilities may often be crime victims, and their  
interests need protection no less than other victims...  
It is incumbent on all judges and judicial staff to  
ensure that every person with a disability be  
provided with reasonable accommodation, if  
available, to ensure that she can be a full and equal  
participant in our system of justice."

-In re McDonough, 457 Mass. 512, 528 (2010)



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## Nonverbal Victims: Key Steps

1. Learn how the child communicates.
2. Try to figure out how that will play out in the courtroom
3. Determine what accommodations will be necessary for the child to testify
4. File a motion in advance of trial to raise the issue with the trial judge

-Christina Rainville, Prosecuting Cases for Children on the Autism Spectrum, ABA (2013)



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## Learn how the child communicates

- Sign language
- Body language (head nods, hand gestures, in writing, letter board)
  - Cues (touching red toy = yes, blue toy = no)
- Sensory stimulation needs
  - Increase or decrease

-Christina Rainville, Prosecuting Cases for Children on the Autism Spectrum, ABA (2013)



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## Learn how the child communicates

- Meet with caregivers, teachers, and special educators
- Consider:
  - Video testimony
  - Interpreter/other assistance
  - Leading questions
    - "A witness's physical disability is a 'special circumstance' justifying a decision to allow counsel to ask leading questions of the witness."
  - Is an expert needed to explain communication, or is caregiver/teacher appropriate?

-Christina Rainville, Prosecuting Cases for Children on the Autism Spectrum, ABA (2013)



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## Nonverbal accommodations

- File motion
  - Supportive adults can testify at pretrial hearing to child's communicative needs
  - Consider interlocutory appeal if denied
- Federal law requires accommodation for witnesses with communication disabilities
  - ADA requires witness accommodation by state courts

-Christina Rainville, Prosecuting Cases for Children on the Autism Spectrum, ABA (2013)



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## Contingencies

- Develop (and practice) alternative methods to disclosure
  - In addition to verbal testimony, consider anatomy diagrams, dolls, or other methods tailored to child
  - Learn points of possible hesitation or silence (not necessarily most graphic piece of testimony)
- Case Study: Iran Glover
  - Iran's plan: terrify 5 victims into silence
  - Courtroom accommodation motion almost completely denied
    - 143 counts (don't do this)



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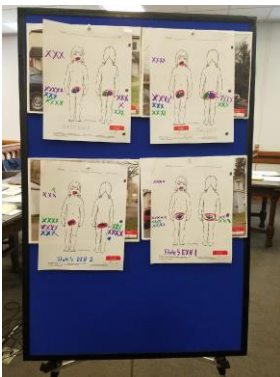
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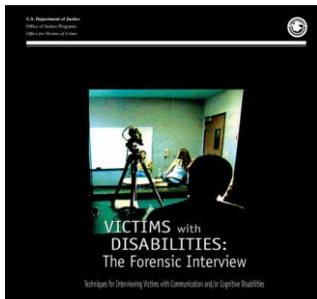
## Resources

Sue Perlis Marx, *Victim Recantation in Child Sexual Abuse Cases: A Team Approach to Prevention, Investigation and Trial*, 2(4) Journal of Aggression, Maltreatment & Trauma 105 (1999)



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## Consult Your MDT



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